Borhan bin Hj Daud & Ors v Abd Malek bin Hussin

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–122 OF 2007
RAUS SHARIF, SULONG MATJERAIE AND AHMAD MAAROP JJCA
25 MARCH 2010

Constitutional Law — Attorney General — Prosecutorial discretion — Power to institute, conduct or discontinue proceedings — Decision of deputy public prosecutor to charge or not, whether discretionary power of public prosecutor — Dissatisfaction with public prosecutor's decision, whether justiciable — Federal Constitution art 145(3) — Criminal Procedure Code s 376

Constitutional Law — Fundamental liberties — Arrest of persons — Arrest under the Internal Security Act 1960 ('ISA') — Whether the ISA a special law made under art 149 of the Federal Constitution — Whether the ISA valid notwithstanding inconsistencies with arts 5, 9, 10 and 13 of the Federal Constitution — Federal Constitution arts 5, 9, 10 & 149 — Internal Security Act 1960 s 73(1)

Preventive Detention — Detention order — Whether lawful — Detention under Internal Security Act 1960 ('ISA') — Whether the ISA a special law made under art 149 of the Federal Constitution — Whether the ISA subject to rights protected under arts 5, 9, 10 and 13 of the Constitution — Whether the ISA valid notwithstanding inconsistencies with arts 5, 9, 10 and 13 of the Constitution — Whether arresting officer obliged to furnish detainee with detailed grounds for arrest — Whether detaining authority obliged to disclose material evidence and sufficient particulars to justify detainee's arrest and detention — Whether insufficiently filled form issued under s 73(1) of the ISA could impugn detention under said section

The respondent claimed that his arrest and detention by the police for 57 days under the Internal Security Act 1960 ('the ISA') was unlawful. He further claimed that he was assaulted and tortured whilst under police custody. He sued the appellants in the High Court for damages for false imprisonment, assault and battery. The High Court declared that the arrest and detention of the respondent was unlawful, and a violation and a breach of his fundamental rights under the Federal Constitution ('Constitution'). In deciding for the respondent, the High Court judge held that: (i) the respondent's arrest and detention was unlawful because: the first appellant had not properly informed the respondent of the grounds for his arrest, the first appellant had failed to adduce sufficient evidence before the court to justify the arrest and detention of

the respondent under s 73(1) of the ISA, and the respondent's arrest and detention were mala fide; (ii) the extension of the respondent's detention after the 24 hour detention was not done in compliance with s 73(3)(a), (b) and (c) of the ISA; (iii) the respondent's arrest and detention was mala fide since no material particulars or evidence was produced in the court and the respondent was not given the right of access to counsel throughout his detention; (iv) the respondent had indeed been assaulted in the manner described by the respondent; and (v) the unwillingness of the DPP to prosecute the respondent for lodging a 'false' police report against the IGP and the first appellant, indicated that there was some truth in the report made by the respondent. The respondent was awarded substantial damages for false imprisonment, assault and substantial exemplary damages. The appellants appealed to the Court of Appeal.

Held, allowing the appellants' appeal with costs here and below:

(1) The arrest of the respondent was not an ordinary arrest. The respondent was arrested under s 73(1) of the ISA. The ISA is a special law made under art 149 of the Constitution. Article 149 provides that laws such as the ISA are valid notwithstanding their inconsistencies with arts 5, 9, 10 and 13 of the Constitution. In the instant case, the Federal Court would approve of the Federal Court's decision in *Kam Teck Soon* although it was in conflict with an earlier Federal Court decision in *Mohamad Ezam* which held that the ISA was still subject to the rights under arts 5(3) and 149 of the Constitution and could not be used to remove such rights. The *Kam Teck Soon* decision represented the better view, especially since it was a later decision of the Federal Court. It should therefore prevail over *Mohamad Ezam* (see paras 19–20 & 23); *Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors and other appeals* [2003] 1 MLJ 321 (FC) followed; *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449 (FC) not followed; *Chong Kim Loy v Timbalan Menteri Dalam Negeri Malaysia & Anor* [1989] 3 MLJ 121 referred; *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 (FC) referred.

(2) The respondent had in fact admitted that the first appellant had informed him that he was arrested under the ISA for involvement in activities posing a threat and prejudicial to the security of the country. The first appellant had also issued the respondent a form informing him of the grounds of his arrest. The respondent had thus been informed of the grounds of his arrest. What the first appellant informed the respondent was sufficient particulars for the purpose of art 5(3) of the Constitution and did not make the arrest and detention of the respondent unlawful. The first appellant was not required to inform the respondent the grounds of his arrest in detail. There was no requirement for the first appellant to satisfy the court with sufficient

particulars and material evidence of the respondent's activities to justify the arrest and detention of the respondent under s 73(1) of the ISA (see paras 25–26 & 33); *Re Tan Sri Raja Khalid bin Raja Harun Inspector-General of Police v Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 (SC) referred; *Chong Kim Loy v Timbalan Menteri Dalam Negeri Malaysia & Anor* [1989] 3 MLJ 121 referred; *Wong Fook Nyen v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [1988] 2 CLJ (Rep) 543 referred; *PE Long @ Jimmy & Ors, Re; PE Long & Ors v Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [1976] 2 MLJ 133 referred; *Inspector-General of Police & Anor v Lee Kim Hoong* [1979] 2 MLJ 291 referred.

(3) The forms used under s 73(3)(a), (b) and (c) of the ISA are merely administrative forms. Insufficient particulars in those forms have no legal impact and cannot be considered as a basis for censuring the legality of detention under s 73(1) of the ISA. It is also not the intention of the Legislature for the officers authorising the further detention under s 73(3)(a), (b) and (c) of the ISA to state or explain the reasons for authorising such detention. The High Court judge had exceeded his jurisdiction by enlarging the meaning of s 73(3)(a), (b) and (c). He had extended the meaning to include imposing a duty on the police officers to disclose the particulars as a basis to extend the detention or state the reasons for further extension of the detention when Parliament had never intended for such (see paras 36 & 38).

(4) An arrest and subsequent detention under the ISA does not require the detaining authority to disclose material evidence and sufficient particulars as to the reasons for the detainee's arrest and detention. Thus mala fide had not been substantiated on this ground. Further, a violation of art 5(3) — the right to access to counsel — does not make the arrest and detention mala fide (see paras 40–41); *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449 not folld; *Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors and other appeals* [2003] 1 MLJ 321 (FC) followed.

(5) Appellate intervention is permissible where there has been no or insufficient judicial appreciation of the evidence by a trial judge. In the instant case, the trial judge failed to appreciate sufficiently the evidence adduced before him. His findings of facts that the respondent had been assaulted or tortured were clearly against the weight of evidence. Since liability was not established against the appellants, there was no question of awarding damages, exemplary, aggravated or otherwise (see paras 44–45 & 55); *Coghlan v Cumberland* [1898] 1 Ch 704 referred; *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 referred; *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 referred.

(6) The trial judge erred when he held that the unwillingness of the DPP to prosecute the respondent for lodging a 'false' report against the IGP and the first appellant indicated that there was some truth in the report made by the respondent. The unwillingness of the DPP to charge the respondent for making a false report could not be used as a basis to infer that the DPP and the police were trying to cover up the case. The decision to charge or not is clearly within the discretion of the DPP in exercising the powers of the public prosecutor enshrined in art 145(3) of the Constitution and s 376 of the Criminal Procedure Code. Anyone dissatisfied with the public prosecutor's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence, should seek his remedy elsewhere, but not in the courts. The decision of the DPP not to prosecute the case alone without more did not make the investigation carried out by the police on the respondent's police report on the assault 'nothing but a mere sham' (see paras 50 & 53–54); *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152 (FC) referred; *Johnson Tan Han Seng v Public Prosecutor; Soon Seng Sia Heng v Public Prosecutor Public Prosecutor v Chea Soon Hoong; Teh Cheng Poh v Public Prosecutor* [1977] 2 MLJ 66 (FC) referred.

[Bahasa Malaysia summary

Responden mendakwa bahawa tangkapan dan penahanannya oleh pihak polis selama 57 hari di bawah Akta Keselamatan Dalam Negeri 1960 ('AKDN') adalah salah di sisi undang-undang. Selanjutnya dia mendakwa bahawa dia diserang dan diseksa semasa dalam jagaan polis. Dia menyaman perayu-perayu di Mahkamah Tinggi untuk ganti rugi bagi pemenjaraan salah, serangan dan hentaman. Mahkamah Tinggi mengisytiharkan bahawa penangkapan dan penahanan responden menyalahi undang-undang, dan merupakan pencabulan dan pelanggaran hak asasinya di bawah Perlembagaan Persekutuan ('Perlembagaan'). Dalam memutuskan memihak kepada reponden, hakim Mahkamah Tinggi memutuskan bahawa: (i) penangkapan dan penahanan responden menyalahi undang-undang kerana: perayu pertama tidak memberitahu responden dengan betul sebab penangkapannya, perayu pertama gagal mengemukakan keterangan yang mencukupi kepada mahkamah untuk mewajarkan tangkapan dan tahanan responden di bawah s 73(1) AKDN dan penangkapan dan penahanan responden adalah mala fide; (ii) pelanjutan penahanan responden selepas 24 jam penahanan tidak dilakukan menurut s 73(3)(a), (b) dan (c) AKDN; (iii) penangkapan dan penahanan responden adalah mala fide kerana tiada butiran atau keterangan material dikemukakan ke mahkamah dan responden tidak diberi hak kepada khidmat peguam selama penahanannya; (iv) responden telah diserang seperti yang telah dijelaskan olenya; dan (v) ketidakrelaan timbalan pendakwa raya untuk mendakwa responden kerana melaporkan laporan polis palsu terhadap Ketua Polis Negara

dan perayu pertama menunjukkan bahawa terdapat kebenaran dalam laporan yang dibuat oleh responden. Responden diawardkan ganti rugi substansial bagi pemenjaraan salah, serangan dan ganti rugi teladan substansial. Perayu-perayu merayu ke Mahkamah Rayuan.

Diputuskan, membenarkan rayuan perayu-perayu dengan kos di mahkamah ini dan Mahkamah Tinggi:

(1) Tangkapan responden bukanlah tangkapan biasa. Responden ditangkap di bawah s 73(1) AKDN. AKDN merupakan undang-undang istimewa digubal di bawah perkara 149 Perlembagaan. Perkara 149 memperuntukkan bahawa undang-undang seperti AKDN adalah sah tanpa mengambilkira percanggahannya dengan perkara-perkara 5, 9, 10 dan 13 Perlembagaan. Dalam kes ini, Mahkamah Persekutuan mengesahkan keputusan Mahkamah Persekutuan dalam kes *Kam Teck Soon* walaupun ia bertentangan dengan keputusan Mahkamah Persekutuan dalam kes *Mohamad Ezam* yang memutuskan bahawa AKDN masih tertakluk kepada hak-hak di bawah perkara 5(3) dan 149 Perlembagaan dan tidak boleh digunakan untuk menyingkirkan hak-hak tersebut. Keputusan *Kam Teck Soon* memberikan pandangan yang lebih baik, lebih-lebih lagi ia merupakan keputusan yang terkini (lihat perenggan 19–20 & 23); *Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors and other appeals* [2003] 1 MLJ 321 (MP) diikut; *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449 (MP) tidak diikut; *Chong Kim Loy v Timbalan Menteri Dalam Negeri Malaysia & Anor* [1989] 3 MLJ 121 dirujuk; *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 (MP) dirujuk.

(2) Responden mengakui bahawa perayu pertama telah memaklumkannya bahawa dia ditahan di bawah AKDN kerana keterlibatannya dalam kegiatan-kegiatan yang mengancam dan memprejudiskan keselamatan negara. Perayu pertama juga mengeluarkan borang kepada responden memberitahunya alasan-alasan penangkapan. Apa yang diberitahu perayu pertama kepada responden adalah butiran yang mencukupi bagi tujuan perkara 5(3) Perlembagaan dan tidak menjadikan penangkapan dan penahanan responden menyalahi undang-undang. Perayu pertama tidak dikehendaki memberitahu responden alasan-alasan penangkapannya secara terperinci. Tiada keperluan bagi perayu pertama memuaskan mahkamah dengan butiran yang mencukupi dan keterangan material kegiatan-kegiatan responden untuk mewajarkan penangkapan dan penahanan responden di bawah s 73(1) AKDN (lihat perenggan 25–26 & 33); *Re Tan Sri Raja Khalid bin Raja Harun Inspector-General of Police v Tan Sri Raja Khalid bin Raja Harun* [1988]

1 MLJ 182 (MA) dirujuk; *Chong Kim Loy v Timbalan Menteri Dalam Negeri Malaysia & Anor* [1989] 3 MLJ 121 dirujuk; *Wong Fook Nyen v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [1988] 2 CLJ (Rep) 543 dirujuk; *PE Long @ Jimmy & Ors, Re; PE Long & Ors v Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [1976] 2 MLJ 133 dirujuk; *Inspector-General of Police & Anor v Lee Kim Hoong* [1979] 2 MLJ 291 dirujuk.

(3) Borang-borang yang digunakan di bawah s 73(3)(a), (b) dan (c) AKDN hanyalah borang-borang pentadbiran. Butiran yang tidak mencukupi dalam borang-borang tersebut tidak memberi kesan undang-undang dan tidak boleh disimpulkan sebagai dasar untuk mengecam kesahihan penahanan tersebut di bawah s 73(1) AKDN. Juga bukanlah niat Perundangan untuk pegawai-pegawai memerintahkan penahanan lanjut di bawah s 73(3)(a), (b) dan (c) AKDN untuk menyatakan atau menjelaskan alasan-alasan memerintahkan penahanan tersebut. Hakim Mahkamah Tinggi telah melampaui bidang kuasanya dengan meluaskan maksud s 73(3)(a), (b) dan (c). Beliau telah melanjutkan maksudnya termasuklah mengenakan tanggungjawab terhadap pegawai-pegawai polis untuk mendedahkan butiran sebagai alasan untuk melanjutkan penahanan tersebut atau menyatakan alasan-alasan untuk penahanan lanjut apabila Parlimen tidak pernah berniat sebegitu (lihat perenggan 36 & 38).

(4) Penangkapan dan penahanan di bawah AKDN tidak memerlukan pihak berkuasa penahanan tersebut mendedahkan keterangan material dan butiran mencukupi sebagai alasan-alasan penangkapan dan penahanan orang yang ditahan. Oleh itu mala fide tidak dibuktikan atas alasan ini. Selanjutnya, pencabulan perkara 5(3) — hak untuk mendapat khidmat peguam — tidak menjadikan penangkapan dan penahanan tersebut mala fide (lihat perenggan 40–41); *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449 tidak diikut; *Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors and other appeals* [2003] 1 MLJ 321 (MP) diikut.

(5) Campur tangan mahkamah rayuan dibenarkan apabila tiada penilaian kehakiman keterangan atau penilaian kehakiman keterangan yang tidak mencukupi oleh hakim bicara. Dalam kes ini, hakim bicara gagal menilai dengan secukupnya keterangan yang dikemukakan kepadanya. Penemuan faktanya bahawa responden diserang atau diseksa adalah jelas menentang nilai keterangan. Disebabkan liabiliti tidak dibuktikan terhadap perayu-perayu, tiada persoalan pemberian award ganti rugi, teladan, tambahan atau sebaliknya (lihat perenggan 44–45 & 55); *Coghlan v Cumberland* [1898] 1 Ch 704 dirujuk; *Lee Ing*

Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97 dirujuk; *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 dirujuk.

(6) Hakim bicara khilaf apabila memutuskan bahawa ketidakrelaan timbalan pendakwa raya mendakwa responden kerana melaporkan laporan palsu terhadap Ketua Polis Negara dan perayu pertama menunjukkan bahawa terdapat kebenaran dalam laporan yang dibuat oleh responden. Ketidakrelaan timbalan pendakwa raya membuat tuduhan terhadap responden kerana membuat laporan palsu tidak boleh digunakan sebagai dasar untuk membuat kesimpulan bahawa timbalan pendakwa raya dan pihak polis cuba untuk menutup kes tersebut. Keputusan untuk membuat tuduhan atau tidak adalah jelas budi bicara timbalan pendakwa raya dalam melaksanakan kuasa-kuasa pendakwa raya seperti termaktub dalam perkara 145(3) Perlembagaan dan s 376 Kanun Prosedur Jenayah. Sesiapa yang tidak berpuas hati dengan keputusan pendakwa raya untuk tidak mendakwa, atau tidak meneruskan dengan pendakwaan atau keputusannya membuat tuduhan bagi kesalahan yang kurang serius apabila terdapat keterangan tentang kesalahan yang lebih serius, harus mencari remedinya dengan cara lain, tetapi bukannya di mahkamah. Keputusan timbalan pendakwa raya hanya untuk tidak mendakwa kes tersebut tidak membuatkan siasatan yang dilakukan oleh pihak polis atas laporan polis responden atas serangan tersebut adalah 'nothing but a mere sham' (lihat perenggan 50 & 53–54); *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152 (MP) dirujuk; *Johnson Tan Han Seng v Public Prosecutor; Soon Seng Sia Heng v Public Prosecutor Public Prosecutor v Chea Soon Hoong; Teh Cheng Poh v Public Prosecutor* [1977] 2 MLJ 66 (MP) dirujuk.]

Notes

For a case on detention order, whether lawful, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) para 1470.

For cases on arrest of persons, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2047–2049.

For cases on prosecutorial discretion, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1886–1887.

Cases referred to

Abdul Ghani Haroon v Ketua Polis Negara and another application (No 3) [2001] 2 MLJ 689; [2001] 2 CLJ 709, HC (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)

Chong Kim Loy v Timbalan Menteri Dalam Negeri Malaysia & Anor [1989] 3 MLJ 121, HL (refd)

Choo Kok Beng v Choo Kok Hoe & Ors [1984] 2 MLJ 165, PC (refd)
Coghlan v Cumberland [1898] 1 Ch 704, CA (refd)
Dalip Bhagwan Singh v Public Prosecutor [1998] 1 MLJ 1; [1997] 4 CLJ 645, FC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
Inspector-General of Police & Anor v Lee Kim Hoong [1979] 2 MLJ 291, FC (refd)
Johnson Tan Han Seng v Public Prosecutor; Soon Seng Sia Heng v Public Prosecutor Public Prosecutor v Chea Soon Hoong; Teh Cheng Poh v Public Prosecutor [1977] 2 MLJ 66, FC (refd)
Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors and other appeals [2003] 1 MLJ 321, FC (folld)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)
Long bin Samat & Ors v Public Prosecutor [1974] 2 MLJ 152, FC (refd)
Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals [2002] 4 MLJ 449, FC (not folld)
PE Long @ Jimmy & Ors, Re; PE Long & Ors v Menteri Hal Ehwal Dalam Negeri Malaysia & Ors [1976] 2 MLJ 133 (refd)
Ponnampalam Selvanayagam v University of the West Indies [1983] 1 WLR 585, PC (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holidays Sdn Bhd [1993] 1 MLJ 113, SC (refd)
Tan Sri Raja Khalid bin Raja Harun Inspector-General of Police, Re v Tan Sri Raja Khalid bin Raja Harun [1988] 1 MLJ 182, SC (refd)
Wong Fook Nyen v Timbalan Menteri Dalam Negeri, Malaysia & Ors [1988] 2 CLJ (Rep) 543, HC (refd)

Legislation referred to

Criminal Procedure Code s 376
Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(1), (2), 6(1), Part II
Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 3(1)
Federal Constitution arts 5, 5(3), (4), 9, 10, 13, 145(3), 149, 150
Internal Security Act 1960 ss 73(1), (3), (3)(a), (b), (c)
Penal Code s 182

Appeal from: Suit No S3 (S5)–21–20 of 1999 (High Court, Kuala Lumpur)

Iznan bin Ishak (Senior Federal Counsel, Attorney General's Chambers) for the appellants.
R Sivarasa (Daim & Gamany) for the respondent.

Raus Sharif JCA (delivering judgment of the court):

[1] This is an appeal from the judgment of the High Court at Kuala Lumpur. The High Court had declared that the arrest and detention of the respondent was unlawful, a violation and a breach of the respondent's fundamental rights under the Federal Constitution. The respondent was then awarded damages of RM1,000,000 for false imprisonment, RM500,000 for general damages for assault and ill-treatment and RM1,000,000 for exemplary damages.

[2] The first appellant at the material time was a police officer. The second appellant is the Inspector General of Police, while the third appellant is the Federal Government. The claim against the third appellant is for vicarious liability in respect of the torts of the first and second appellants.

[3] We heard the appeal on 8 September 2009. Having heard the parties, we adjourned the matter for our consideration and decision. We now give our decision and the reasons for the same.

[4] The relevant facts of this case are these. At about 10 pm on Friday, 25 September 1998, a group of special branch officers led by the first appellant arrested the respondent. He was arrested in front of his house at Taman Sri Watan, Ampang when he was returning home and after he had just alighted from a car driven by a friend.

[5] The respondent was arrested under s 73(1) of the Internal Security Act 1960 ('the ISA'). After the arrest, the first appellant and his men entered the respondent's house and seized several documents and items. Thereafter, he was blindfolded and taken to Ibu Pejabat Polis Kontinjen ('IPK') at Jalan Hang Tuah, Kuala Lumpur.

[6] The respondent arrived at the IPK at about 11pm. He was taken up to a room on the first floor. He was there until 4am before being taken to Bukit Aman. He remained in police custody for 57 days until his release on 21 November 1998.

[7] The respondent's case was that his arrest and detention for 57 days was unlawful and that he was assaulted and tortured while he was in police custody.

The appellants contended otherwise. Each and every allegations of assault or torture as described by the respondent were denied by the appellants.

[8] After hearing the witnesses for the respondent and the appellants, the learned High Court judge made the following findings:

(a) The arrest and detention of the respondent was unlawful.

(b) The respondent had proved on the balance of probabilities that he was assaulted in the manner he described.

(c) The respondent was unlawfully denied of his constitutional rights to see a lawyer.

[9] After finding that the appellants were liable, the learned High Court judge then considered the issue of quantum of damages and made the following awards:

(a) General damages of RM700,000 for unlawful arrest and detention for 57 days and adding a further RM300,000 for aggravating factors making it RM1,000,000;

(b) General damages of RM500,000 for assault and ill-treatment;

(c) Exemplary damages of RM1,000,000 for oppressive, arbitrary and unconstitutional action; and

(d) Interest at 8%pa from the date of judgment until realisation and costs.

WAS THE ARREST AND DETENTION OF THE RESPONDENT UNLAWFUL?

[10] The learned High Court judge in his judgment held that the arrest and detention of the respondent was unlawful for the following reasons:

(a) The respondent was never properly informed by the first appellant of the grounds of his arrest as required under art 5(3) of the Federal Constitution ('the Constitution').

(b) The first appellant had failed to satisfy the court with sufficient particulars and material evidence of the respondent's activities to justify the arrest and detention of the respondent under s 73(1) of the ISA.

(c) The arrest and detention of the respondent were mala fide.

[11] The learned High Court judge held that notwithstanding the provisions of the ISA, it is the legal and constitutional duty on the part of the

arresting authority to inform the person arrested the grounds of his arrest as imposed by art 5(3) of the Constitution which provides:

> Where a person is arrested he shall be informed as soon as may be of the grounds of arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

[12] The learned High Court judge opined that in order to make the constitutional protection meaningful, the 'detainee must be told briefly and in clear and simple language that he is being arrested because there is reason to believe that his activities (the gist of which should be intimated to the detainee) have been such as to justify his detention in order to prevent him from acting in a manner prejudicial to the security of the country'. In the present case, he found what was informed by the first appellant to the respondent regarding his arrest was not sufficient and in violation of art 5(3) of the Constitution.

[13] Thus, the first issue that calls for our consideration is whether art 5(3) had been violated. The respondent in his evidence had testified that all that he was told at the point of arrest was that he was being arrested under the ISA. The first appellant on the other hand had testified that he had informed the respondent that the arrest was made under s 73(1) of the ISA. He told the respondent that he was arrested because he was involved in activities which was a threat and prejudicial to the security of the country.

[14] The first appellant further testified that after taking the respondent to the IPK and after lodging a report, he prepared a form in compliance with art 5(3) of the Constitution explaining to the respondent the grounds of his arrest. The document which was exhibited reads as follows:

> Saya Borhan bin Hj Daud (G 6724) pada 25 September 1998 jam 2310 hrs telah memberitahu kamu Abdul Malek bin Hussin No KP 560814–06–5467 sebab-sebab kamu ditangkap di bawah seksyen 73(1) Akta Keselamatan Dalam Negeri 1960 iaitu:
>
> (a) Saya mempercayai ada alasan-alasan untuk menahan kamu di bawah seksyen 8 Akta Keselamatan Dalam Negeri 1960; dan
>
> (b) Saya mempercayai kamu telah bertindak dengan cara yang memudaratkan keselamatan Malaysia.

[15] The learned High Court judge held that even if he were to accept the first appellant's version it could not be sufficient compliance of art 5(3) of the Constitution. According to him, what was said by the first appellant did not convey to the respondent the essence of what the respondent was alleged to have done that his detention was necessary to prevent him from acting in a manner prejudicial to the security of Malaysia.

[16] Senior federal counsel, Encik Iznan Ishak appearing for the appellants submitted that the learned High Court judge had erred in law when he imposed a duty on the part of the arresting authority to inform the person arrested under s 73(1) of the ISA of the grounds of arrest. According to him, art 5(3) of the Constitution did not apply to any arrest under the ISA, which was a preventive law made under art 149 of the Constitution. He referred to the Federal Court case of *Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors and other appeals* [2003] 1 MLJ 321 ('*Kam Teck Soon*') to support his argument.

[17] Encik Iznan Ishak further submitted that even if art 5(3) applied to arrest under s 73(1) of the ISA, the respondent was in fact informed by the first appellant of the grounds of his arrest. According to him, the respondent was informed of sufficient material evidence and particulars to show the basis of the 'reasons to believe' that the detention of the respondent was necessary to prevent him from acting in a manner prejudicial to the security of the country.

[18] Encik Sivarasa Rasiah, learned counsel for the respondent submitted otherwise. He referred to us the Federal Court case of *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449 ('*Mohamad Ezam*'), which established that the detaining authority must inform the arrested person of the grounds of his arrest and to provide sufficient material evidence and particulars to show the basis of the reasons to believe that the detention of the respondent was necessary to prevent him from acting in a manner which was prejudicial to the security of the country.

[19] At the outset, we need to point out that the arrest of the respondent was not an ordinary arrest. The respondent was arrested under s 73(1) of the ISA. The ISA is a special law made under art 149 of the Constitution, which provides as follows:

> If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation —
>
> (a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or
>
> (b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or
>
> (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or
>
> (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
>
> (e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

A (f) which is prejudicial to public order in, or the security of, the Federation or any part thereof;

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 and 13, or would apart from this Article be outside the legislative power B of Parliament and Article 79 shall not applied to a Bill for such Act or any amendment to such a Bill.

[20] As can be seen above, art 149 of the Constitution expressly provides that such a law as the ISA is valid notwithstanding that it is inconsistent with arts 5, C 9 or 10 and 13 of the Constitution. The Federal Court in *Kam Teck Soon* had addressed this issue. Ahmad Fairuz CJ speaking for the majority stated at p 332 as follows:

Article 149(1) of the Federal Constitution and art 150(6) of the Federal D Constitution for instance, show clearly how art 5 cannot apply to arrest 'under any law whatsoever in force in this country'. ...

In light of art 150(2) of the Federal Constitution, s 3(1) of the Ordinance clearly cannot be contended to be invalid just because it is inconsistent with art 5(3) of the Federal Constitution. What is the purpose of not invalidating s 3(1) if it is not for E validating an arrest and detention which becomes unlawful due to non-compliance of art 5(3). I am of the view that if s 3(1) is inconsistent with art 5(3) then s 3(1) must prevail over art 5(3). This would save the arrest and detention which would have been unlawful because of violation of art 5(3). This in my view is the purpose of art 150(6) of the Constitution.

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[21] We are bound by the above statement of principle. We are conscious that the above statement of principle was in relation to arrest under s 3(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('Ordinance'), a law made under art 150 of the Federal Constitution. However, G we are of the view that the same interpretation should apply to s 73(1) of the ISA. This is because the wording of s 3(1) of the Ordinance is similar to that under s 73(1) of the ISA in substance.

[22] In fact, the issue on the validity of legislations made under arts 150 or H 149 of the Constitution which are inconsistent with the provisions on fundamental liberties as enshrined in the Constitution had been decided in a number of cases. One of such cases is *Chong Kim Loy v Timbalan Menteri Dalam Negeri Malaysia & Anor* [1989] 3 MLJ 121 ('*Chong Kim Loy*'). In that case, the applicant was detained by an order of the Deputy Minister of Home I Affairs under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985. One of the points argued on behalf of the applicant was that there had been a contravention of art 5(4) of the Constitution by reason of the fact that the applicant had not been produced before a magistrate within 24 hours after the arrest and detention at the police station. Edger Joseph Jr J (as he then was)

concluded that the powers of preventive detention spelt out in Part II of the Act, in particular s 3(2) appearing therein, do, in his opinion, make such restriction manifestly clear and was therefore valid notwithstanding that it is inconsistent with art 5(4).

[23] The case of *Chong Kim Loy* was accepted with approval by the Federal Court in *Kam Teck Soon*. We are aware that what was decided in *Kam Teck Soon* is in conflict with an earlier decision of the Federal Court in *Mohamad Ezam*. In *Mohamad Ezam*, the Federal Court held that the ISA was still subject to the rights entrenched in art 5(3) and art 149 could not be used to remove such rights.

[24] The existence of two different schools of thought makes it imperative for us to indicate our choice for a better view. With respect, we subscribe to and agree with the principle propounded in *Kam Teck Soon*. This is especially so when *Kam Teck Soon* is a later decision of the Federal Court. Being a later decision it must prevail over *Mohamad Ezam*. This principle was established by the Federal Court in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645.

[25] However, the real issue in the present case is not so much whether the respondent was informed of the grounds of his arrest. Rather, it is whether what the first appellant informed the respondent was sufficient for the purpose of art 5(3) of the Constitution. It is our considered view that what had been communicated to the respondent by the first appellant was in sufficient compliance with art 5(3) of the Constitution. In fact, the respondent had admitted that he was informed by the first appellant the reasons of his arrest. He was told that he was arrested under the ISA for being involved in activities which was a threat and prejudicial to security of the country.

[26] The form issued by the first appellant, further substantiated the fact that the respondent was informed of the grounds of his arrest. The relevant part of the form reads:

> … sebab-sebab kamu ditangkap di bawah seksyen 73(1) Akta Keselamatan Dalam Negeri 1960 iaitu:
>
> (a) Saya mempercayai ada alasan-alasan untuk menahan kamu di bawah seksyen 8 Akta Keselamatan Dalam Negeri 1960; dan
>
> (b) Saya mempercayai kamu:
>
> (i) telah bertindak dengan cara yang memudaratkan keselamatan Malaysia;
>
> (ii) ...
>
> (iii) ...

[27] In fact, what is required of an arresting officer to inform a detainee upon arrest under s 73(1) of the ISA had been clarified in a number of cases. In the Supreme Court case of *Re Tan Sri Raja Khalid bin Raja Harun Inspector-General of Police v Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 at p 187, Salleh Abas LP said:

> In simple language what s 73(1) of the Act provides is that a police officer may arrest any person in respect of whom the police officer has reason to believe there are grounds to justify the person's detention under s 8 of the Act and that person either has acted or is about to act in a manner prejudicial to the security of the nation. The Penal Code define 'reason to believe' to mean 'sufficient cause to believe'.

[28] In *Chong Kim Loy*, Edgar Joseph Jr J (as he then was) speaking on arrest under s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (which is in pari materia with s 73(1) of the ISA) had this to say:

> It is obvious that an arrest by a police officer pursuant to the provisions of s 3(1) has to be on the ground that he has reason to believe that there are grounds which could justify detention under s 6(1) and nothing else.

[29] Lim Beng Choon J, in *Wong Fook Nyen v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [1988] 2 CLJ (Rep) 543 speaking on the same subject said at p 549:

> However learned counsel went on to contend that even assuming that Inspector Hassan had informed the applicant of the grounds of his arrest as asserted in his affidavit the said 'grounds' were insufficient to satisfy the requirement of cl 3 of art 5 of the Constitution. I am afraid I cannot accept such a contention as it has been stated that it is not necessary for a person making the arrest even under the ordinary law to the state the charge in technical or precise language. In the present case the arresting officer had told the applicant that the grounds of his arrest were that there was reason to believe that the applicant was associated with activities relating to the trafficking of drugs and that it was necessary in the interest of public order to detain him under s 3(1) of the Act. What else could we expect the arresting officer to tell him at that stage?

[30] The same requirement was held to be sufficient for an arrest under s 3(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (which is in pari materia to s 73(1) of the ISA and s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985). In *Re PE Long @ Jimmy & Ors; PE Long & Ors v Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [1976] 2 MLJ 133, Arulandon J said:

> Counsel for the applicants argues that the affidavits of the officer do not give the grounds and that it is the duty of the courts to look into the grounds and see if the grounds are reasonable and that if the grounds are not reasonable, art 5(3) of the

Constitution has been contravened. This submission is wholly without substance. Article 5(3) of the Constitution only states that the person arrested shall be informed as soon as may be of the grounds of arrest and s 3(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969, only state that any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe that there are grounds which would justify his detention under s 4(1). No further conditions are required for a police officer to arrest a person under this section.

[31] Similarly, in *Inspector-General of Police & Anor v Lee Kim Hoong* [1979] 2 MLJ 291, Harun J (as he then was) made the following observation:

I should make it clear that the police are not being called upon to disclose the evidence which led to the arrest and detention but merely the grounds of arrest. All the police have to say, for example, is that 'Lee was arrested because we have reason to believe that is necessary for the prevention of crimes involving violence'.

[32] In *Kam Teck Soon*, on arresting the appellant, the arresting officer informed the appellant that he was arrested under s 3(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 as there was reason to believe that there were grounds that would justify the appellant's detention. However, the arresting officer did not disclose to the appellant the information received that caused him to have the reason to believe that there were grounds justifying the detention. The Federal Court held at p 332:

Furthermore, s 3(1) only requires the arresting officer to have 'reason to believe that there are grounds ...'. It does not require the grounds to be informed to the arrested person. And even if it is so required because of art 5(3) of the Constitution, I am of the view that what the arresting officer had informed the appellant was sufficient compliance with art 5(3). The grounds were those that would justify a detention under s 4(1) of the Ordinance. Viscount Simon in *Christie and another v Leachinsky* [1947] 1 All ER 567at p 572, said:

> These citations, and others which are referred to by Lord Du Parcq, seem to me to establish the following propositions:
>
> > 4. The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, prima facie, entitled to his freedom and is only required to submit to restraint on his freedom *if he knows in substance the reason* why it is claimed that this restraint should be imposed. (Emphasis added.)

Obviously the appellant must have known in substance the reason for his arrest ie that he was arrested because there were grounds which would justify his detention under s 4(1) of the Ordinance.

[33] Thus, it is our view that the first appellant is not required to inform the respondent the grounds of his arrest in detail. It is absolutely legitimate for the first appellant to state he has 'reason to believe' that there are grounds to justify the respondent's detention under s 73(1) of the ISA. There is also no requirement for the first appellant to satisfy the court with sufficient particulars and material evidence of the respondent's activities to justify the arrest and detention of the respondent under s 73(1) of the ISA. Based on the facts of this case, it is our view that the respondent was informed of the grounds of his arrest. What the first appellant informed the respondent was sufficient particulars and thus did not make the arrest and detention of the respondent unlawful.

EXTENSION OF THE DETENTION

[34] The learned High Court judge had also found that the extension of the detention of the respondent after the 24 hour detention was not done in compliance with s 73(3)(a), (b) and (c) of the ISA. To understand the learned High Court judge's reasoning, s 73(3)(a), (b) and (c) is hereby reproduced:

> (3) Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under section 8:
>
> Provided that —
>
> (a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;
>
> (b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and
>
> (c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf, who shall forthwith report the same to the Minister.

[35] The learned High Court judge following the reasoning in his own case of *Abdul Ghani Haroon v Ketua Polis Negara and another application (No 3)* [2001] 2 MLJ 689; [2001] 2 CLJ 709 found that the forms signed by ASP Koh Seng Keng ('SD9') and DSP Cheong Ah Moi ('SD10') extending the respondent's detention beyond 24 hours and beyond 48 hours respectively, did not address the legal requirements of spelling out the purpose of the detention and relating it to the 'reason to believe' with sufficient particulars. He found that SD9 and SD10 did not explain plausibly why the extensions were needed. He also found that the final extension under s 73(3)(c) by DSP Philip ('SD8')

was improper. He gave two reasons. First, there was no documentary evidence to show any instrument that SD8 was the officer designated by the inspector general. Second, SD8 acted in an automatic and rubber-stamping fashion in extending the detention beyond 30 days.

[36] We would like to point out that the forms used under s 73(3)(a), (b) (c) and are merely administrative forms. Section 73(3) does not refer to any form to be used by the police officers referred to thereunder to exercise their powers. Thus, the insufficient particulars in those forms, will have no legal impact and cannot be considered as a basis for censuring the legality of detention under s 73(1) of the ISA. Section 73(3)(a), (b) and (c) only require that any extension must be authorised by the police officers of the relevant rank. There is no requirement for the SD9, SD10 and SD8 to explain and give sufficient particulars in extending the respondent's detention. In this case, the relevant forms have been signed by the relevant officers of the required rank. It indicates that the authorisation for the said subsection have been complied with. A close and careful reading of s 73(3)(a), (b) and (c) indicate that it is never the intention of the Legislature for the officers authorising the further detention to state or explain the reasons for authorising the detention.

[37] A big issue was created by the learned High Court judge as to the absence of documentary evidence to show that SD8 was the officer designated by the inspector general under s 73(3)(c) to report to the Minister on the inspector general's behalf. But, had the learned High Court judge evaluated the evidence of SD8, he would have found that SD8 was the designated officer of the inspector general. In fact, upon reading through the record, the document would have been produced if the learned High Court judge had allowed the request of senior federal counsel to adjourn the re-examination of SP8 on the following day so as to enable SD8 to produce the document.

[38] Clearly, the learned High Court judge had exceeded his jurisdiction by enlarging the meaning of s 73(3)(a), (b) and (c). He had extended the meaning to include imposing a duty on the police officers to disclose the particulars as a basis to extend the detention or state the reasons for further extension of the detention in which Parliament had never intended.

MALA FIDE

[39] The learned High Court judge had also found the arrest and detention of the respondent to be mala fide. He gave two reasons. First, no material particulars or evidence was ever produced to the court to substantiate that the respondent 'terlibat secara langsung di dalam perhimpunan haram yang di mana setiap perhimpunan haram tersebut diakhiri dengan kacau bilau dan

mengganggu ketenteraman awam'. Second, the respondent was not given the right of access to counsel throughout his detention.

[40] With respect, the above two reasons cannot be used as a basis of declaring the arrest and detention of the respondent under s 73(1) of the ISA to be mala fide. As stated earlier, the arrest of the respondent was made under the ISA. It is a special law which is valid even though it contains provisions inconsistent with the provisions on fundamental liberties under the Constitution. As pointed out earlier, an arrest and subsequent detention under the ISA does not require the detaining authority to disclose material evidence and sufficient particulars as to the reasons for his arrest and further detention. Even in ordinary law, it is not a requirement for the arresting authority to state the offence or charge in technical and precise language. Thus, the question of mala fide has not been substantiated.

[41] With regard to the respondent's right to counsel, we are aware that Siti Normah Yaacob FCJ (as she then was) in *Mohamad Ezam* had held that the ISA made no provision for denial of access to legal representation which would be inconsistent with art 5(3), and that art 149 could not be used to remove such rights. However, as we indicated earlier, we preferred the principle decided in *Kam Teck Soon*, as the better one. We hold that a violation of art 5(3) ie right to access to counsel does not make the arrest and detention mala fide.

WAS THE RESPONDENT ASSAULTED?

[42] The respondent alleges that he was first assaulted by the first appellant immediately after his arrest. According to him, he was slapped by the first appellant when he was unable to take the first appellant to the location of his car. The respondent also said that his head was forcibly covered with t-shirt and forced to bend down between his legs in the car as he was taken to IPK Kuala Lumpur. The respondent alleged further assault which, according to him took place at the IPK. In summary, he described how in the air-conditioned room on the first floor of the IPK, he was stripped naked, blindfolded, verbally abused and then physically assaulted. He was hit several times on the face and head. Most of the blows and kicks were directed at his body and legs. His legs were hit with a hard object. He felt over several times as a result of the blows. At an instance when his blindfold slipped, he identified one assailant as the second appellant in person (ie Tan Sri Rahim Noor). The respondent also alleged that after the episode of physical assault liquid smelling like urine was poured into his mouth which was forced open. Throughout the ordeal, he was forced to remain naked. His penis was hit and an object pushed against his anus. He was made to stand in front of an air conditioner and drilled with water.

[43] The learned High Court judge accepted it as a fact that the respondent had been assaulted in the manner described by the respondent. The learned senior federal counsel submitted that the findings of facts by the learned High Court judge were based on inferences and not supported by evidence and ought to be set-aside. Learned counsel for the respondent, on the other hand submitted that this court should not interfere with the findings of facts by the learned High Court judge. He referred to us the cases of *Tan Sri Khoo Teck Puat & Anor v Plenitude Holidays Sdn Bhd* [1993] 1 MLJ 113; *Ponnampalam Selvanayagam v University of the West Indies* [1983] 1 WLR 585; *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517 and *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165 to support his submission.

[44] We are aware of the principles established in those cases. But there are instances where appellate intervention are permissible (see *Coghlan v Cumberland* [1898] 1 Ch 704; *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1). These cases established that appellate intervention is permissible where it can be shown that there has been no or insufficient judicial appreciation of the evidence by a trial judge.

[45] The present case is a clear example where a trial judge failed to appreciate sufficiently the evidence adduced before him. It is our view that on the evidence adduced, the learned High Court judge's findings of facts were clearly against the weight of evidence. We say so for the following reasons. First, the respondent did not make his police report on the alleged assault or torture immediately after his release from detention. He was released on 21 November 1998. However, the police report was only made on 13 March 1999. There was a delay of about three and a half months. The delay raises doubt as to the credibility of the alleged assault. No doubt the respondent did explain the delay in making the report but in our view, his explanation was not credible and should have been rejected by the learned High Court judge.

[46] Second, the coloured photographs taken by SD4 did not indicate any injury to the respondent consistent with a continuous and violent assaults as alleged by the respondent. The photographs were taken at 4am in the morning of 25 September 1998 — ie they was taken immediately after the respondent had alleged being beaten up by the police. But none of the photographs show any trace or mark, indicating the respondent was assaulted while he was in custody of the first appellant.

[47] Third, we have the evidence of SD6, who conducted the body search on the respondent. According to SD6, he conducted a physical body check on the

respondent on 26 September 1998 at 1pm ie few hours after the alleged assault. He described the condition of the respondent as follows:

> Plaintif kelihatan sihat, ceria dan tidak menunjukkan apa-apa tanda bahawa beliau mengalami kecederaan. Cuma secara imbas lalu saya nampak ada sedikit kesan kemerahan pada kedua-dua belah pergelangan tangan plaintif.

SD6 had also testified that the respondent had not made any report of any assault by the police to him. And he did not see any mark on the respondent body.

[48] Fourth, we have the evidence of Dr Vasanty ('SD7') who examined the respondent on 29 September 1998 ie four days after the alleged assault. In her report, SD7 had stated the condition of the plaintiff as follows:

> Present Complaints
>
> Patient complained of pain left foot, left thigh, left leg and low back. He complained of alleged fall on 25 September 1998. He also complained of pain over pelvis and right eye.
>
> Physical Examination
>
> Local Examination
>
> Pelvis — no swelling, no tenderness
>
> Spine — no swelling, no tenderness
>
> Range of movement lumbosacral spine-flexion limited due to pain
>
> Rest of movements-full range
>
> Patient able to move all his joins
>
> Eyes — not congested no flourescein uptake.
>
> Fundus — nothing abnormal detected
>
> Vision — patient able to read tiny print
>
> Bruises over both wrists
>
> Bruise over postero-lateral aspect of left thigh (mid-thigh area)
>
> Bruise over postero-lateral aspect of left leg
>
> Patient was given Ponstan and Papase to treat his complaints.

[49] SP7 in her evidence testified that the respondent did not complaint of any assault or torture by the police to her. Instead, he informed SP7 that the pain on the left foot, left thigh, left leg and low back was the result of an alleged fall on 25 September 1998. Nowhere did the respondent complained of the alleged assault or the inhumane treatment by the police to SP7.

[50] Thus, the learned High Court judge's presumption and inferences that the respondent was in fact assaulted was completely misplaced. He erred when he said that the unwillingness of the deputy public prosecutor ('DPP') to prosecute the respondent for lodging a 'false' report against the inspector general and the first appellant indicated that there must be some truth in the report made by the respondent.

[51] In this case, the police had recommended that the respondent be charged under s 182 of the Penal Code for making a false report but the DPP had directed the police to take 'No Further Action' ('NFA') on the file. But the learned High Court judge had used the said decision of the DPP to draw some adverse inferences against the appellants. The learned High Court judge posed the following questions:

(a) Why did it take nine months for the DPP to respond to SD11's recommendation?

(b) Why didn't SD11 or his supervisor (SAC Mat Zain) send any reminder to the DPP's office when the DPP's office took such a long time to respond?

(c) Why did the DPP's office purposely ignore the recommendation of the police that the plaintiff be charged for making a false report against the IGP?

(d) Why were SD11 and SAC Mat Zain not serious in pursuing the recommendation with the DPP's office when a very serious and scandalous accusation had been formally made against their IGP but, instead, were quick to have the investigation file closed?

[52] Based on the above observations and queries, the learned High Court judge drew an inference that the DPP's office, SAC Hadi Ho ('SD11') and SAC Mat Zain well knew that there was a lot of truth in the respondent's police report against the Tan Sri Rahim Noor and the first appellant. The learned High Court judge then concluded that the investigation carried out by SD11 in respect of the respondent's police report was nothing but a mere sham. He took the DPP to task over the decision of the DPP to direct 'NFA' on the file, and concluded that the DPP must be called by the appellants to explain the delay in deciding the case.

[53] With utmost respect, we are of the view that the unwillingness of the DPP to charge the respondent for making false report cannot be used as a basis to infer that the DPP and the police were trying to cover up the case. It is an established fact that the DPP and the police are under two separate organisations, with separate powers and responsibility under the law. There is no necessity for the DPP to explain to the court as to the delay in making the decision in not charging the respondent. In this respect, the learned High Court judge had overstepped his duty when he made such statement which can be understood to mean that if there is a delay in investigation and in making a decision to prosecute an offender, it must be presumed that the police and the DPP were working together in cahoot to conceal the truth and that they were acting in mala fide. Such allegations are very serious allegations which require proof and not mere inferences.

[54] We were also unable to appreciate why the learned judge could easily conclude that the investigation carried out by SAC Ho ('SD11') in respect of the respondent's police report was 'nothing but a mere sham'. In his evidence SD11 had stated that he had recorded 33 statements from witnesses including the IGP as well as the respondent. From the investigations, he had recommended to his supervisor, SAC Mat Zain for the respondent to be charged for making a false report. According to him, his supervisor agreed with his recommendation but the DPP decided otherwise. In this regard it must be stated that in arriving at the decision whether or not to institute a charge against any person, the DPP is not bound by the recommendation by the police. The decision to charge or not is clearly within the discretion of the DPP in exercising the powers of the public prosecutor which is enshrined in art 145(3) of the Constitution and s 376 of the Criminal Procedure Code. Apart from being in touch with the police and other investigating agencies, the public prosecutor has information not available to the courts and on which to base his decision on whether or not to prosecute and if so on which charge. Anyone who is dissatisfied with the public prosecutor's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence, should seek his remedy elsewhere, but not in the courts (see *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152 (FC) and *Johnson Tan Han Seng v Public Prosecutor; Soon Seng Sia Heng v Public Prosecutor Public Prosecutor v Chea Soon Hoong; Teh Cheng Poh v Public Prosecutor* [1977] 2 MLJ 66 (FC)). In our view the decision of the DPP not to prosecute the case alone without more does not make the investigation carried out by the police to be 'nothing but a mere sham'.

[55] In our judgment, the findings of facts by the learned High Court judge that respondent had been assaulted or tortured is not supported by evidence. The findings were perverse and cannot be upheld. It must be set aside. As

liability is not established against the appellants, there is no question of awarding damages, be it exemplary, aggravated or otherwise which the respondent sought in the statement of claim.

[56] For the reasons given above, the appellants' appeal is allowed. The orders of the High Court against the appellants are set aside. The respondent to pay the costs here and in the court below.

Appellants' appeal allowed with costs here and below.

Reported by Andrew Chritopher Simon